CEU, Local 237, IBT, 2 OCB 2d 37 (BCB 2009)

(IP) (Docket No. BCB-2722-08).

Summary of Decision: The Union alleged that DHS's unilateral revision of its patrol guide for Special Officers working in DHS facilities by adding a provision specifically regulating the subject of visible body tattoos constituted the imposition of a "grooming standard" as to which bargaining was required. The City asserted that the provision was not bargainable because the provision was adopted to preserve the dignity and safe environment of its clients in the face of the undisputed display by certain DHS Officers of tattoos related to racist gangs. The City also claimed that no factual allegations were pleaded in support of the claim of practical impact. The Board found that the provision at issue did not involve a mandatory subject of bargaining, as the employer's interest in delivering services in a non-threatening atmosphere outweighed the already sharply attenuated interest of the DHS Officers in their appearance while on duty. The Board also found that the allegations as to practical impact were conclusory and without specification or quantification. The Board denied the petition in its entirety. ***(Official decision follows.)***

OFFICE OF COLLECTIVE BARGAINING
BOARD OF COLLECTIVE BARGAINING

In the Matter of the Improper Practice Proceeding

-between-

CITY EMPLOYEES UNION, LOCAL 237,
INTERNATIONAL BROTHERHOOD OF TEAMSTERS,

Petitioner,

-and-

THE NEW YORK CITY DEPARTMENT OF HOMELESS SERVICES
and THE NEW YORK CITY OFFICE OF LABOR RELATIONS,

Respondents.

DECISION AND ORDER

On September 22, 2008, the City Employees Union, Local 237, International Brotherhood of Teamsters ("Union" or "Local 237"), filed a verified improper practice petition against the New

York City Department of Homeless Services ("Department" or "DHS") and the New York City Office of Labor Relations ("OLR")(collectively, "City"). The petition alleges that DHS violated § 12-306(a)(1), (4) and (5) of the New York City Collective Bargaining Law (New York City Administrative Code, Title 12, Chapter 3) ("NYCCBL") when, in July 2008, DHS unilaterally issued a provision in its Peace Officer Patrol Guide ("Patrol Guide") requiring that body tattoos be covered while the officer is on duty. The Union, while not challenging the factual grounds that led DHS to impose this new rule, claimed that the provision was in essence a new "grooming standard." As such, it asserts, it is as a matter of law a mandatory subject of bargaining. Further, the Union claims that the change has had a practical impact upon employees. The City asserted that the provision merely clarified and codified existing administrative practices, without implicating any duty to bargain prior to implementation, and, further, that allegations of impact were speculative. The Board finds that the new rule at issue is not a mandatory subject of bargaining. The Board also finds that the allegations as to practical impact were conclusory and without specification or quantification. The petition is denied in its entirety.

BACKGROUND

The parties have stipulated that no material facts are in dispute, and thus that no hearing is warranted in this matter.

DHS provides temporary, emergency shelter for eligible homeless people in the City of New York. An affidavit sworn to by Joseph A. Garcia, Director of Peace Officers, Security and Emergency Operations filed in support of the City's answer to the instant petition (the "Garcia Affidavit") describes the mission of DHS as follows:

> Our mission, in cooperation and partnership with the providers we serve, is to support the delivery of vital social services by creating the safest environment possible for our clients, staff, and the community. We pledge to maintain the public peace, value human life, respect each individual and render our services with courtesy, pride and civility while maintaining the highest standard of integrity.

(Garcia Affidavit, ¶ 5.) To this end, DHS employs 422 Peace Officers in the civil service title of Special Officer ("Peace Officers"). They are represented, for purposes of collective bargaining, by the Union. Garcia asserts that the Peace Officers employed by DHS must maintain order in DHS facilities and ensure the delivery of services to DHS clients. The perception of the Peace Officers by DHS clients and the public is important, Garcia stated, in order to secure their cooperation in maintaining safety in the shelters. Toward this goal, DHS Peace Officers must project an attitude of professionalism and respect in order to maintain control and facilitate a safe environment, including identifying and screening persons and their possessions upon intake. (*Id.*, ¶ 9.)

DHS distributes a Patrol Guide to all DHS Peace Officers when they are hired. Promulgated in January 2002 and updated periodically through Operations Memoranda, the DHS Patrol Guide is intended to promote professionalism and respect for DHS clients. It requires DHS Peace Officers to maintain their agency-issued uniforms in clean, pressed, and serviceable condition, and to maintain a neat, clean and clean-shaven personal appearance with no jewelry, earrings or other personal adornments while on duty. No non-uniform items are permitted to show above the uniform collar or below the sleeve.[1] (Garcia Affidavit, ¶¶ 10-12; Patrol Guide, Proc. 110-1 (C), General Uniform Regulations, Ans. Ex. 3).

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[1] The Patrol Guide containing these requirements as to personal appearance was issued on January 1, 2002, effective that date. It is updated periodically through Operations Memos. (Garcia Affidavit, ¶ 12).

In his affidavit, the accuracy of which is undisputed by the Union, Garcia stated that in April 2008 he became aware that memo books of a group of Peace Officers in one DHS location displayed the likeness of a logo incorporating a stylized depiction of a skull which is associated with a fictional comic book and movie vigilante known as "The Punisher." Garcia stated that he asked the Peace Officers about the image on the memo books and that the Officers told him that it was the symbol of a rock band. On or about May 7, 2008, based upon information provided by a DHS employee, Garcia accessed a "MySpace" web page belonging to the DHS Peace Officers. Garcia observed these particular employees depicted on the web page in their official DHS uniform along with "multiple pictures of the 'Punisher' skull" and references to "GFBD" and "GFBD Brotherhood." According to Garcia, "GFBD" stands for "God Forgives, Brothers Don't," and is an acronym that has been used in popular culture to identify white supremacist prison gangs and is derived from violent and criminal origins. (Garcia Affidavit, at ¶¶ 13-17). The City notes that members of one particular violent prison gang wearing "GFBD" tattoos have been convicted of murder committed inside the Nevada State Prison. (Ans. ¶ 38); *see Rowland v. State*, 118 Nev. 31, 39 P.3d 114 (2002). Garcia further explained:

> Several former DHS employees informed me that there were groups within the Peace Officers who were getting the same tattoo and exhibiting gang behavior. I witnessed several gang poses on the "MySpace" web page. I had received information from the New York Police Department ("NYPD") Intelligence Division about gangs and gang activities.

(Garcia Affidavit ¶ 18). Garcia further observed that the MySpace web site belonging to DHS Peace Officers also displayed the phrase "Beat the Homeless." (Garcia Affidavit at ¶ 14).

On July 8, 2008, DHS issued Operations Memo # 08-10 (alternatively "the Memo").

Effective that date, it states, in its entirety, as follows:

> Directive: By Order of the Deputy Commissioner:
> Effective immediately, Members of the Service must cover any and all visible tattoos while on Duty, by regulation long sleeve uniform and tie. This includes but is not limited to any tattoo visible on the neck, arms, wrists or on a visible area of the leg, ankle or foot. This order is to be added to [the] personal appearance section of the Patrol Guide. There are no exceptions.

Beginning that same month, DHS also orally amended this order to permit the Peace Officers to cover tattoos with makeup, bandages and/or color-coordinated athletic bands. (Garcia Affidavit ¶ 21). Garcia states, absent any contradiction, that approximately two Peace Officers who reported to work without covering their visible tattoos were sent home to cover them and to return to work, but no employees have been disciplined as a result of Operations Memo # 08-10. (Garcia Aff. ¶ 22).

In a letter dated July 17, 2008, to the DHS Deputy Commissioner for Security and Emergency Operations, counsel for the Union stated that "it was [his] understanding that disciplinary warning notices have been issued to various employees and placed in their files" as a consequence of the issuance of Operations Memo # 08-10. (Pet. Ex. B). He demanded that the discipline be rescinded immediately and, since "the issues raised in the memo in question deal directly with mandatory subjects of bargaining," that the "Department conduct formal negotiations with Local 237 over the decision to issue and implement [Operations] Memo # 08-10, as well as the impact thereof." The City admits receipt of this correspondence. There is no documentation in the record as to any response by DHS to the letter.

The Union seeks a cease-and-desist order by this Board directing that DHS stop further implementation of Operations Memo # 08-10, rescind the Memo, and rescind any discipline that may have been invoked as a result of any alleged violation of the Memo. The Union also seeks an order

by this Board directing the City to bargain in good faith concerning its decision to issue the Memo and "the impact of its decision to issue Operations Memo # 08-10," and directing such other action as the Board may deem necessary to effectuate the purposes of the NYCCBL.

POSITIONS OF THE PARTIES

Union's Position

The Union argues that the matter of tattoos at issue in this case implicates a "grooming standard" which constitutes a mandatory subject of bargaining. The Union does not dispute the factual bases for promulgating the Memo alleged by the City in the affidavit accompanying its Answer and the exhibits thereto, but does assert that these reasons did not in any way transform the Memo's new requirements from the kind of "grooming standards" regulation which the New York State Public Employment Relations Board have found to be negotiable. The Union stated that Operations Memo # 08-01 represented a unilateral change to grooming standards rather than a restatement of pre-existing departmental policy about uniforms. The Union asserts that the Memo enlarged the scope of pre-existing policy with respect to uniforms, an imposition, in the Union's view, of a new grooming standard applying to the subset of Peace Officers who have tattoos.

Prior to the promulgation of Operations Memo # 08-01, tattoos were not altogether prohibited and Peace Officers were not required to cover them up. Following the promulgation of the Memo, DHS Peace Officers have been required to cover up visible tattoos. While officers may use makeup, scarves, and other means to comply with it, the Union contends that this requirement to cover tattoos may, in some circumstances, be difficult to accomplish, depending upon where on the body they are placed. The Union cites the wearing of long shirts, socks and ties in hot weather and the wearing

of socks and closed shoes to cover tattoos on a foot or ankle.

Notwithstanding the explicit change in cover-up policy, the Union acknowledges that the Memo's provisions and the rules already in place in the Patrol Guide concerning personal appearance overlap. Those rules require, among other things, that personal adornments not be worn while on duty and that non-uniform items must not show above the uniform collar or below the sleeve. The Union argues, however, that as long as DHS Peace Officers are in compliance with pre-existing policy regarding personal appearance, any workplace rule enlarging the scope of that pre-existing policy cannot be imposed without bargaining.

The implementation by DHS of Operations Memo # 08-10 without negotiating first, in the Union's view, has changed working conditions of the Peace Officers by imposing a new predicate for discipline for the asserted violation of that Memo, a matter which the Union contends should have been negotiated before implementation. As a result of DHS's failure to have negotiated the issue, the City is in violation of NYCCBL § 12-306(a)(1), (4) and (5).[2]

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[2] NYCCBL § 12-306(a) provides in pertinent part:

> It shall be an improper practice for a public employer or its agents:
> (1) to interfere with, restrain or coerce public employees in the exercise of their rights granted in section 12-305 of this chapter;
> * * *
> (4) to refuse to bargain collectively in good faith on matters within the scope of collective bargaining with certified or designated representatives of its public employees;
>
> (5) to unilaterally make any change as to any mandatory subject of collective bargaining or as to any term and condition of employment established in the prior contract, during a period of negotiations with a public employee organization as defined in subdivision d of section 12-311 of this chapter.
>
> NYCCBL § 12-305 provides, in pertinent part:

The Union further contends that, by implementing the Memo, DHS's unilateral action has had a practical impact on the Peace Officers by subjecting various of them to formal discipline for violation of the Memo and by causing them to have to wear long-sleeved shirts, ties, scarves, socks, and closed shoes even in hot weather. This practical impact required bargaining before implementation of the Memo and since bargaining did not occur, DHS should be directed to bargain in good faith.[3]

> Public employees shall have the right to self-organization, to form, join or assist public employee organizations, to bargain collectively through certified employee organizations of their own choosing . . . .
>
> NYCCBL § 12-311(d) provides, in pertinent part:
>
> > Preservation of status quo. During the period of negotiations between a public employer and a public employee organization concerning a collective bargaining agreement, . . . the public employee organization party to the negotiations, and the public employees it represents, shall not induce or engage in any strikes, slowdowns, work stoppages, or mass absenteeism, nor shall such public employee organization induce any mass resignations, and the public employer shall refrain from unilateral changes in wages, hours, or working conditions. This subdivision shall not be construed to limit the rights of public employers other than their right to make such unilateral changes, or the rights and duties of public employees and employee organizations under state law. For the purpose of this subdivision the term "period of negotiations" shall mean the period commencing on the date on which a bargaining notice is filed and ending on the date on which a collective bargaining agreement is concluded or an impasse panel is appointed.

[3] NYCCBL § 12-307 provides, in pertinent part:

> Scope of collective bargaining; management rights.
> a. Subject to the provisions of subdivision b of this section . . . of this chapter, public employers and certified or designated employee organizations shall have the duty to bargain in good faith on wages (including but not limited to wage rates, pensions, health and welfare benefits, uniform allowances and shift premiums), hours (including

City's Position

The City does not dispute the Union's assertion that, prior to the promulgation of Operations Memo # 08-01, tattoos were not altogether prohibited and Peace Officers were not required to cover them up. Following the promulgation of the Memo, DHS Peace Officers have been required to cover up visible tattoos but the City adds that this requirement is a minor addition to pre-existing policy with respect to uniforms and regulations pertaining to personal appearance of DHS Peace Officers. The City asserts that, by maintaining these regulations and policies, DHS is able to fulfill its mission to provide services to homeless individuals and families, services which could be significantly compromised and/or disrupted if DHS Peace Officers were permitted to display racially charged tattoos.

The City asserts that the memo is a mere clarification of pre-existing, written policy in the

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> but not limited to overtime and time and leave benefits), working conditions . . .
>
> b. It is the right of the city, or any other public employer, acting through its agencies, to determine the standards of services to be offered by its agencies; determine the standards of selection for employment; direct its employees; take disciplinary action; relieve its employees from duty because of lack of work or for other legitimate reasons; maintain the efficiency of governmental operations; determine the methods, means and personnel by which government operations are to be conducted; determine the content of job classifications; take all necessary actions to carry out its mission in emergencies; and exercise complete control and discretion over its organization and the technology of performing its work. Decisions of the city or any other public employer on those matters are not within the scope of collective bargaining, but, notwithstanding the above, questions concerning the practical impact that decisions on the above matters have on terms and conditions of employment, including, but not limited to, questions of workload, staffing and employee safety, are within the scope of collective bargaining.

Patrol Guide concerning personal appearance requiring, among other things, that personal adornments not be worn while on duty and that non-uniform items must not show above the uniform collar or below the sleeve. Before the implementation of the Memo, Peace Officers were required to conform to the guidelines, the purpose of which is to present a professional appearance to clients and the public in order to ensure their cooperation with the Officers and encourage the utilization of homeless services. The City contends that the overlap between the Patrol Guide and the Memo's new requirement that visible tattoos be covered is significantly substantial that there is no material change to terms and conditions of employment. Therefore, implementation of the Memo did not require bargaining.

In addition to asserting that the Memo does not amount to a material change, the City contends that the Memo does not constitute a "grooming standard" but is rather an operational directive necessary to promote the agency's mission. Specifically, it was initiated to encourage the utilization of homeless services. Furthermore, the City argues, the parties' collective bargaining agreement contains no restrictions on management's ability to issue orders such as contained in the Memo at issue. In this regard, the City argues, DHS was well within the lawful parameters, under the NYCCBL, to determine the proper environment to accomplish the agency's mission.

The City further contends that the Union has failed to allege facts sufficient to support its contention that Operations Memo # 08-10 has a practical impact on the Peace Officers. The new requirement is only a minimal addition to the pre-existing appearance requirements. The addition to the policy with regard to the use of makeup, bandage, or sports band or some other coverup to obscure any visible tattoos does not rise to the level of an unreasonably excessive or unduly burdensome impact on the Special Officers. In short, the Union's impact-related assertions are non-

specific, premature, speculative, and conjectural. The petition should be denied in its entirety.

DISCUSSION

The Union claims that the unilateral promulgation of Operations Memo # 08-10, requiring DHS Peace Officers to cover any visible body tattoos, constitutes a violation of the City's duty to bargain with respect to terms and conditions of employment. We find that, as a matter of law, it does not.

Under the NYCCBL, public employers and employee organizations are required to bargain over matters concerning wages, hours, and working conditions, and any subject with a significant or material relationship to a condition of employment. *See DC 37, Local 1457,* 1 OCB2d 32, at 26 (BCB 2008); *DC 37*, 75 OCB 8, at 6-7 (BCB 2005); *UFA*, 47 OCB 63, at 18 (BCB 1991). It is an improper practice under NYCCBL § 12-306(a) (4) for a public employer or its agents:

> to refuse to bargain collectively in good faith on matters within the scope of collective bargaining with certified or designated representatives of its public employees. . . .

See also DC 37, 77 OCB 8, at 7-8 (BCB 2006). Where management makes a unilateral change in a term and condition of employment, it accomplishes the same result as if it had refused to bargain in good faith, and likewise commits an improper practice. *See DC 37,* 75 OCB 14, at 13 (BCB 2005). Such an improper practice requires a showing first that the matter sought to be negotiated is a mandatory subject of bargaining. *SSEU, L. 371,* 1 OCB2d 20, at 9 (BCB 2008) (citing *UFOA*, 1 OCB2d 17, at 10 (BCB 2008), and *DC 37,* 75 OCB 14, at 12 (BCB 2005). Additionally, the union must also "demonstrate the existence of such a change from the existing policy or practice." *UFOA*, 1 OCB2d 17, at 9 (BCB 2008); *see also PBA*, 73 OCB 12, at 17 (BCB 2004); *Town of Stony Point*,

26 PERB ¶ 4650 (1993). Only upon a showing of both of these elements will the Board find that an improper practice has occurred. *SSEU, L. 371,* 1 OCB2d 20, at 9 (BCB 2008) (citing *DC 37,* 75 OCB 14, at 12 (BCB 2005)).

Material Change Analysis

In order to determine whether the promulgation of that Memo implicates a duty to bargain on the part of DHS, we evaluate whether it represented a change in the *status quo*. *See, e.g., PBA*, 79 OCB 43, at 8-9 (BCB 2007); *DC 37*, 79 OCB 20, at 12 (BCB 2007). Indeed, there is significant overlap between the Memo and the provisions of the Patrol Guide. Nevertheless, it is undisputed that some tattoos have been tolerated in the past, especially concerning the summer uniform, which covers less of the arms. Therefore, the change cannot conclusively be dismissed as *de minimis*, at least on the record before us.

Operations Memo # 08-10 provides that "[m]embers of the Service must cover any and all visible tattoos while on Duty . . . includ[ing] but . . . not limited to any tattoo visible on the neck, arms, wrists or on a visible area of the leg, ankle or foot." However, other provisions of the DHS Patrol Guide mandate that "no personal adornments" be worn while on duty and that "non-uniform items" not show "above the uniform collar or below the sleeve." (Patrol Guide, Proc. 110-01 § C.) Operations Memo # 08-10 significantly overlaps with the Patrol Guide by categorizing tattoos within the set of "personal adornment" or "non-uniform item" referenced in the Patrol Guide without expanding the class of proscribed items. *See, e.g., PBA*, 79 OCB 43, at 8-9; *DC 37*, 79 OCB 20, at 12. Arguably, any tattoo that runs afoul of the Memo that would also be proscribed by the

Patrol Guide.[4]

The City claims that the promulgation of Operations Memo # 08-10 does not amount to a material change is not without merit, the facts herein present a sufficiently close question of degree as to warrant us to assume the existence of a unilateral change and to proceed to the fundamental question as to whether such a change would impact a mandatory subject of bargaining.

The Union's uncontested assertion regarding a less restrictive application of the uniform policy in the summer, coupled with the lack of a clear pattern of enforcement of the pre-existent policy is sufficient to prevent us from finding that the Memo involved a *de minimis* change.

Negotiability Under the NYCCBL's Balancing Test

The Union argues that the Memo's requirements are the kind of "grooming standards" regulation which PERB has found to be a mandatory subject of bargaining, and which cannot be altered without negotiation. The PERB decisions relied upon by the Union stand for the proposition that "grooming standards involve terms and conditions of employment and are, generally, mandatory subjects of negotiation." *State of New York (Dept, of Tax & Fin.)*, 30 PERB ¶ 3028 (1997) at 3068 (citing *City of Buffalo*, 15 PERB ¶ 3027 (1982)). PERB's conclusion is based on its reasoning that grooming regulations can have an "impact upon employee comfort" and are therefore sufficiently weighty to implicate collective bargaining. *City of Buffalo*, 15 PERB ¶ 3027 at 3044; *State of New York*, 30 PERB ¶ 3028 at 3068. However, in this case the regulation involved is not simply a general grooming standard but is rather a response to the public display by some DHS Peace Officers of insignia relating to racism and violence. Thus, we do not find the PERB decisions cited by the

[4] At the conference in this matter, both parties represented that no specific examples of enforcement of the Patrol Guide's provisions in the specific context of tattoos were known to them.

Union to be apposite to the circumstances of this case.

As we have often stated, "[s]ince neither the NYCCBL nor the Civil Service Law expressly delineates the nature of 'working conditions,' or 'conditions of employment,' both this Board and PERB determine on a case-by-case basis the extent of the parties' duty to negotiate." *DC 37, L. 1457,* 77 OCB 26, at 12 (BCB 2006), citing *DC 37*, 75 OCB 8, at 7 (BCB 2005); *UFOA*, *L. 854,* 45 OCB 4, at 8 (BCB 1990); *DC 37*, 45 OCB 1, at 7-8 (BCB 1990). This case-by-case determination takes the form of a balancing test which weighs the interests of the public employer and those of the union with respect to that subject under the circumstances of the particular case, an approach also employed by PERB under the cognate provisions of the Taylor Law. *See DC 37*, 75 OCB 8, at 7-8; *see also State of New York (Dept. of Corr. Serv.)*, 38 PERB¶ 3008 (2005). The New York Court of Appeals has approved the employment of such a balancing test in determining negotiability by both this Board and by PERB. *Board of Educ. of the City School Dist. of the City of New York v. Pub. Empl. Rel. Bd.*, 75 N.Y. 2d 660, 670-71 (1990) (upholding PERB's use of balancing test and finding negotiability as to compulsory financial disclosure where intrusion on employees' terms and conditions of employment and privacy interests rationally found to outweigh employer's interest in integrity of its work force); *Matter of Levitt v. Board of Coll. Barg. of the City of New York*, 79 N.Y.2d 120 (1992) (upholding Board's employment of balancing test, but finding requirement to disclose matters of public record involve non-mandatory subjects of bargaining); *see also Matter of Lippman v. Pub. Empl. Rel. Bd.*, 296 A.D.2d 199, 208-09 (3d Dept. 2002) (approving PERB's application and result under balancing of interests).

The Memo at issue is not one of the specific subjects which have been "pre-balanced" by the Legislature and require no further analysis by this Board. *See DC 37, L. 1457*, 77 OCB 26, at 12,

citing *DC 37*, 75 OCB 13, at 8 (BCB 2005); *County of Montgomery*, 18 PERB ¶ 3077, at 3167 (1985). It is also not a subject identified in NYCCBL § 12-307(b) as reserved for managerial discretion, such as the right to direct employees or to maintain the efficiency of government operations. Therefore, a balancing of the interests is required to resolve the issue before us.

Operations Memo # 08-10 was intended to prohibit the display of tattoos that have been used to communicate messages that are racist and evocative of violence. *See People v. Chessman*, 2008 WL 907571 (Cal.App. 2d Dist.2008)(discussing "Punisher logo" as gang-related); *Rowland v. State*, 118 Nev. 31, 39 P.3d 114 (2002) (same; "GFBD"). It was implemented upon the discovery that some Special Officers have affected such tattoos. Based on the nature of the services that DHS provides, such tattoos could reasonably be expected to engender, as a response, distrust and anxiety in the population which receives DHS services. In view of the functions performed by Peace Officers–securing client cooperation, keeping the peace, and maintaining shelters–and their daily interactions with clients while verifying their identities and screening their possessions as they enter a shelter, client distrust and anxiety could surely undermine the ability of DHS to provide services to its clients.

The Memo, which revises the General Uniform Regulations section of the Patrol Guide, itself applicable to both uniforms and personal appearance, is directed not to grooming in general but seeks to preserve the dignity and safe environment of DHS's clients. The Memo governs Officers only in their role of representing the employer, in circumstances in which the Officers are charged with keeping order among City residents within DHS-operated shelters or other facilities. These Officers are therefore placed in a role of authority over City residents whose adverse circumstances alone have placed them in need of shelter or services from DHS, and the main compelling circumstance

for preserving professionalism and respect for agency clients.

The Union asserts two interests: that of its employees in their own image or style, and the potential discomfort involved in covering up tattoos in warmer weather. In balancing these interests against those asserted by the City, we note that the interest of DHS Peace Officers in terms of their autonomy over their personal appearance has already been significantly attenuated due to the fact that their personal appearance, clothing, and personal adornments while on duty are already comprehensively limited under the Patrol Guide.

In balancing the interests of each party, we find that, under the specific facts involved here, the balance favors management. We do so because the employer's interest in preserving an atmosphere of professionalism and respect among and for DHS clients outweighs the inconvenience Peace Officers may experience in having to cover up their tattoos. Thus, we find that the subject of visible tattoos worn by Peace Officers while on-duty at DHS constitutes a non-mandatory subject of bargaining.[5]

Our decision in this matter is consistent with, though by no means compelled by, *Inturri v. City of Hartford*, 165 Fed. Appx. 66 (2d Cir. 2006), in which the Second Circuit Court of Appeals applied a balancing test to the respective interests of the employer. In *Inturri*, the Second Circuit considered whether the City of Hartford's restrictions on the police officers' display of spider web

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[5]We do not rule, of course, on any constitutional claim that the employees or the Union may have under the First Amendment to the United States Constitution, or its State counterpart, N.Y. Const. Art. I, § 8, or indeed on any claim arising under any statute other than the NYCCBL, all of which such claims would be beyond the jurisdiction of this Board. *See*, *e.g.*, *Babayeva*, 1 OCB2d 15, at 7-8 (BCB 2008).

Similarly, we need not decide any claim that the Memo is overly broad, as no such claim has been raised before us.

tattoos while on duty violated the Officers' First Amendment rights. The Second Circuit noted that a "police department has a reasonable interest in not offending, or appearing unprofessional before, the public it serves," and found that this interest justified the prohibition of displaying tattoos which "were known to some people as a symbol of racist violence." *Id*. at 68-69 (citing *Kelley v. Johnson*, 425 U.S. 238, 247 (1975)); *see also Locurto v. Giuliani*, 447 F.3d 159, 178 (2d Cir. 2006). While these cases do not address the subject of bargainability under the NYCCBL, the factors relied upon by the Court in determining that the balance tipped in favor of the management policy–that the restriction was limited to Officers in their role in engaging with the public as peace officers, that their appearance while on duty was already subject to significant limitation, and that the restriction was reasonably related to the employer's ability to perform its mission–are similar to the considerations supporting management's interest here. *Inturri*, 165 F.3d at 68-69; *Kelley*, 425 U.S. at 247.

Accordingly, we find, on balance, that the attenuated nature of the interest of the employees, under the circumstances presented in this case, is outweighed by the interest articulated on behalf of the public employer, well founded in case law, and we hold, therefore, that, the promulgation of Operations Memo # 08-10, at issue herein, does not give rise to a duty to bargain over its implementation. Accordingly, no violation of the NYCCBL has been established.

Practical impact analysis

Finally, the Union's claim that the requirement in Operations Memo # 08-10 that body tattoos be covered while on duty has a practical impact on the Special Officers in this case has not been made out. As we explained in *DC 37, Local 376*:

> [A] public employer is not required to bargain over a question concerning a practical impact prior to this Board determining that a practical impact exists. *Soc. Serv. Employees Union, Local 371*, [69

> OCB 1 (BCB 2002)] at 8. A petitioner urging the Board to find such an impact must present more than conclusory statements of a practical impact in order to require the employer to bargain or, indeed, in order to warrant a hearing to present further evidence. *Correction Captains Ass'n, Inc.*, [51 OCB 28 (BCB 1993)] at 8. The existence of a practical impact, a factual question, cannot be determined when a union does not provide sufficient facts.

79 OCB 20 (BCB 2007), at 13-14. The record contains insufficient factual allegations to form a basis for a finding of practical impact or even to raise a material issue of fact such that a hearing would be in order on that issue. Rather, the practical impact claim is based purely on conclusory, indeed generic, allegations absent specification or quantification of the impact alleged. Accordingly, we dismiss that claim as well.

Conclusion

As we find that the promulgation of Operations Memo # 08-10 requiring the covering of tattoos while Special Officers are on duty did not amount to a unilateral change in the terms and conditions of employment of the affected employees and also that insufficient factual support has been alleged for any claim of practical impact, we find no violation of NYCCBL §12-306a(1), (4) or (5). Accordingly, the improper practice petition is denied in its entirety.

ORDER

Pursuant to the powers vested in the Board of Collective Bargaining by the New York City Collective Bargaining Law, it is hereby

ORDERED, that the improper practice petition, docketed as BCB-2722-08, filed by the City Employees Union, Local 237, International Brotherhood of Teamsters, be, and the same hereby is denied in its entirety.

Dated: November 23, 2009
New York, New York

MARLENE A. GOLD
CHAIR

CAROL A. WITTENBERG
MEMBER

M. DAVID ZURNDORFER
MEMBER

The full and free expression of viewpoints is to be encouraged and protected. However, incitement to hatred is not, in my view, entitled to the same overarching protection as are other forms of speech, particularly in the context here present. For that reason, I concur in the result.

CHARLES G. MOERDLER
MEMBER